U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 0 3 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner was a reseller of computer networking hardware. It sought to permanently employ the beneficiary in the United States as a channel manager and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

On January 28, 2009, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage for the subject position. The petitioner filed a timely appeal with some additional documentation – including copies of its federal income tax return for 2007, the beneficiary's pay stubs from September 2008 to January 2009, the beneficiary's Form W-2, Wage and Tax Statement, for 2008, and the petitioner's bank statements from January 2008 through December 2008.

On December 28, 2011, the AAO sent the petitioner a Notice of Derogatory Information and Request for Evidence (NDI/RFE). The AAO noted that the official website of the California Secretary of State identified the petitioning entity – Onestream.net, Inc. – as dissolved. Noting that the petition would be moot if the petitioning entity is no longer an active business, the AAO requested that this evidentiary issue be resolved by the petitioner. The AAO also requested the submission of additional evidence that the petitioner has had the continuing ability to pay the proffered wage from the priority date (December 7, 2007) up to the present. In particular, the AAO requested copies of the petitioner's federal income tax returns for the years 2008, 2009, and 2010 and W-2 forms issued to the beneficiary for the years 2009, 2010, and 2011 (or a final earnings statement for 2011 in lieu of a Form W-2).

The AAO received a response from counsel on February 21, 2012, confirming that Onestream.net, Inc. (Onestream.net) was dissolved and indicating that a new corporate entity – Onestream Technologies, Inc. (OTI) – was operating in its place in the same line of business. Counsel stated that the proffered position continues to exist. Along with his letter counsel submits the following documentation relating to the alleged corporate succession and the petitioner's ability to pay the proffered wage:

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[1] The regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

- Two letters from [redacted], representing OTI, both dated February 9, 2012, responding to the NDI/RFE and confirming the company's offer of employment to the beneficiary.
- Website printouts of OTI showing that it is operating in the same line of business as Onestream.net.
- Organizational charts of [redacted] and OTI.
- OTI's Certificate of Incorporation, dated October 16, 2009, along with letters and documents associated with the incorporation including a Statement of Incorporator, two letters and an account statement from the Incorporator on the letterhead of Harvard Business Services, Inc., and an information sheet called Post-Incorporating Filings.
- A letter from the Internal Revenue Service (IRS), dated December 21, 2009, accepting OTI as an S Corporation.
- The Certificate of Dissolution for [redacted] issued by the California Secretary of State, dated May 18, 2010.
- A copy of the federal income tax return (Form 1120S) of [redacted] for 2007 (already in the record), and California state income tax return of that entity for 2007.
- Bank statements of [redacted] from December 2007 through September 2008 (already in the record).
- The quarterly federal tax returns (Forms 941) of Onestream.net for the first two quarters of 2008.
- Earnings statements issued to the beneficiary by [redacted] from September 2008 through May 2009 (some of which were already in the record).

Thus, there are two issues on appeal:

(1) Has [redacted]. established that it is the legal successor-in-interest to the original petitioner, [redacted]?

(2) Has the petitioner established its continuing ability to pay the proffered wage of the subject position from the priority date up to the present?

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Successor-in-Interest issue

U.S. Citizenship and Immigration Services (USCIS) has issued no regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter*

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of Dial Auto") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. The case involved a petition filed by [redacted] Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Matter of Dial Auto does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[3] *Id.* at 1569 (defining "successor"). When considering other business

[3] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[4]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[5] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the

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continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[4] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[5] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage to the beneficiary. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the foregoing analysis to the instant petition, the AAO determines that [redacted] Technologies, Inc. has not established a valid successor-in-interest relationship to [redacted] Inc. for immigration purposes. In Schedule K-1 of the federal income tax return filed by [redacted] for 2007, Scott Woodland is identified as the company's sole shareholder with 100% of the stock.[6] When OTI was incorporated on October 16, 2009, however, the accompanying "Statement of Incorporator" named [redacted] as the initial shareholder "until [her] successors are elected and qualify." A letter from the Incorporator to [redacted] on the same date indicated that she owned 1,500 shares of OTI.[7] No further documentation has been submitted indicating any change in the ownership of OTI. Thus, as far as the record shows, there was not a continuity of ownership from [redacted] to OTI. While the former was 100% owned by [redacted] the latter is 100% owned by [redacted] The record contains no contract or agreement of any kind between [redacted] and OTI. Most importantly, there is no evidence as to what assets and liabilities, as well as legal rights and obligations, if any, were conveyed from one entity to the other. In all of the corporate documentation submitted in response to the NDI/RFE, not one refers to both [redacted] and OTI in the same document. OTI was incorporated in October 2009 without reference to [redacted] and [redacted] was dissolved in May 2010 without reference to OTI. It appears that OTI simply picked up the business abandoned by [redacted] which does not establish a *bona fide* successor-in-interest relationship. It is also unclear from the record as to when this event occurred.

For the reasons discussed above, the petitioner has failed to establish tha[redacted] Technologies, Inc. is the successor-in-interest to the petitioner, Onestream.net, Inc. Since [redacted] is dissolved, its petition cannot be approved. A petitioner must intend to employ the beneficiary in order to maintain an employment-based petition. *See* 8 C.F.R. § 204.5(c). Furthermore, the ETA Form 9089 is only valid for the particular job opportunity certified therein. *See* 20 C.F.R. § 656.30(c).

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[6] The organizational chart for Onestream.net submitted in response to the NDI/RFE identifies the following employees: (1) [redacted] President/CEO; (2) [redacted], Vice President-Sales; (3) Channels Manager (the proffered position, unfilled); (4) [redacted] Technical Manager; and (5) [redacted], Staffing Services Manager.

[7] The organizational chart for OTI submitted in response to the NDI/RFE shows a reshuffling of the company's positions, with (1) [redacted] as President/CEO/Sales; (2) [redacted] as Sales Manager; (3) [redacted] as Technical Manager/Systems Engineer; (4) Staffing Services Manager – unfilled; and (5) Channels Manger (the proffered position) – unfilled.

Ability to Pay issue

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on December 7, 2007. Box G of the form states that the "offered wage" for the channel manager position is $33.57 per hour, which amounts to a $61,097.40 per year based on a 35-hor work week and on the offered wage set forth in Part 6 of the Form I-140.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage from the priority date up to the present, the AAO first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record in this case indicates that the beneficiary worked for the petitioner from September 2008 through May 2009. While the beneficiary's earnings statements show that his pay exceeded the proffered wage during that time, his period of employment spans only a fraction of the time between the priority date (December 7, 2007) and the present. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present through its actual compensation to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without

consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Consistent with its prior adjudications, and backed by federal court rulings, the AAO does not consider depreciation in examining the petitioner's net income.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax return. Net

current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The only federal income tax return in the record is the Form 1120S filed by [redacted] for 2007. As discussed by the Director in his denial decision of January 2009, the tax return did not establish the petitioner's ability to pay the proffered wage in 2007 based on either its net income or its net currents assets that year. The 2007 Form 1120S was submitted by the petitioner in November 2008 in response to the Director's original RFE. In its NDI/RFE of December 2011, the AAO requested that the petitioner update the record by submitting its federal income tax returns (Forms 1120S) for the years 2008-2010. The only documents received in response, however, were the quarterly tax filings by [redacted] for the first two quarters of 2008. Thus, documentation specifically requested by the AAO has not been provided. In addition, the AAO notes that OTI has not submitted a single piece of evidence regarding its ability to pay the proffered wage, though it has been in existence since October 2009.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Although specifically requested by the AAO, neither the petitioner nor OTI provided copies of their federal income tax returns for the years 2008, 2009, and 2010. The tax returns would show the amount of taxable income reported to the Internal Revenue Service (IRS) by [redacted] and OTI, and further reveal their ability to pay the proffered wage during those years. The failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Thus, the petitioner has not established its ability to pay the beneficiary the proffered wage from the priority date up to the present on the basis of either its net income or its net current assets or the compensation it actually paid to the beneficiary in those years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612.[9]

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[8]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[9] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a

As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the record indicates that [redacted] was incorporated in 2001 and had just four employees at the time the instant petition was filed in 2008. Aside from the federal income tax returns for 2007 and the first two quarters of 2008, and the beneficiary's earnings statements during his brief period of employment from September 2008 to May 2009, the only other financial evidence submitted by the petitioner are bank statements from December 2007 through December 2008. Reliance on these bank statements is misplaced. First, bank statements are not among the three types of required evidence, enumerated in 8 C.F.R. § 204.5(g)(2), to demonstrate a petitioner's ability to pay the proffered wage. While the regulation allows additional materials "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence has been submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Furthermore, the bank statements cover barely over one year of the requisite time period – from the priority date up to the present – that the petitioner must establish its ability to pay the proffered wage.

Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish its ability to pay the proffered wage based on the totality of its circumstances, as in *Sonegawa*.

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage from the priority date (December 7, 2007) up to the present. On this ground as well, the petition cannot be approved.

Conclusion

The petitioner has failed to establish that [redacted], Inc. is the successor-in-interest to

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resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

the petitioner, Onestream.net, Inc. In addition, the petitioner has failed to establish its ability to pay the proffered wage for the channel manager from the priority date up to the present. The petition will be denied on both of these grounds, with each considered as an independent and alternative ground for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.